

8-23-2013

## State v. Smith Appellant's Brief 1 Dckt. 40947

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	S.Ct. No. 40947
vs.	)	
	)	
DANA LYDELL SMITH,	)	
	)	
Defendant-Appellant.	)	
_____	)	

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OPENING BRIEF OF APPELLANT

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Appeal from the District Court of the Fifth  
Judicial District of the State of Idaho  
In and For the County of Minidoka

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HONORABLE RANDY J. STOKER  
District Judge

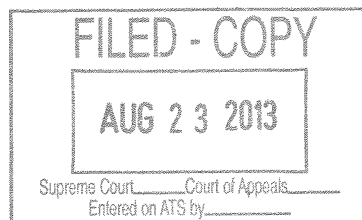
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## II. STATEMENT OF THE CASE

### A. Nature of the Case

Appellant Dana Smith filed a pro se motion for a new trial asserting that he should have but did not have a competency evaluation or competency hearing and that he was not competent during the trial proceedings. CR 6-7. The district court found the motion to be untimely, declined to appoint counsel and denied the motion. CR 49-50.

### B. Procedural History and Statement of Facts

#### 1. *Prior proceedings*

Mr. Smith was convicted of grand theft and his conviction and sentence were affirmed by the Court of Appeals in an unpublished opinion on May 20, 2009. *State v. Smith*, No. 35216.<sup>1</sup> Mr. Smith then filed a petition for post-conviction relief prior to the completion of the direct appeal. *Id.* Relief was denied and an appeal taken. *Smith v. State*, No. 40418. However, appellate relief was denied by the Court of Appeals in an unpublished opinion on November 14, 2011. *Id.*

On January 19, 2012, Mr. Smith filed a motion for new trial on the basis of newly discovered evidence. CR 1. Smith's motion was based on his assertion that he was mentally incompetent when he was tried for grand theft and that the district court had erred in failing to *sua sponte* order a competency evaluation under I.C. § 18-211.

#### 2. *Factual background for new trial motion*

Mr. Smith was correct in his assertion that there was never a competency hearing, but was

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<sup>1</sup> The Court has taken judicial notice of the files and records in *State v. Dana Smith*, No. 39704 (the motion for new trial appeal) and *State v. Dana Smith*, No. 35216 (the appeal from the judgment and sentence).

mistaken in his assertion that he did not have a competency evaluation. The record from No. 35216 shows that Judge John Melanson ordered an I.C. § 18-211 competency evaluation. T (No. 35216) (April 10, 2007), pg. 52, ln. 1-9. Richard V. Smith, Ph.D. did the evaluation and wrote:

His ability to assist in his own defense presents a question, however. He can and does ramble off rather inappropriately, both in terms of content and style intermittently. In my view that likely seriously impairs his ability to work systematically with his attorney in a sustained fashion. That is, there are brief periods in which he appears to be very lucid and very much on target. However, as indicated, intermittently he gets off target, is fairly irrational, bizarre, and grandiose. In those regards, [i]t is my opinion that he cannot effectively and systematically work with his defense attorney in a sustained fashion.

Smith Report, pg. 8 (in PSI). Dr. Smith went on to say:

In my opinion this examinee does not need to be rehospitalized. He can in all likelihood be treated safely on an outpatient basis and should resume medications to stabilize his mood. That being the case, once those medications would become effective then he could in all likelihood proceed with the matters in court that he is currently facing.

*Id.* Thus, Dr. Smith did not think Mr. Smith was competent to stand trial because he could not assist his attorney in a rational manner, but that he could be competent to do so once he was stabilized on his medications.

Dr. Smith's report was dated on May 2, 2007. On June 4, 2007, Mr. Smith's attorney, Dennis Byington, told the Court, when Mr. Smith was not present, that Mr. Smith "had been found to be not competent in aiding in his own defense to a certain degree." T (No. 35216) (June 4, 2007) pg. 69, ln. 12 - pg. 70, ln. 7. He went on to tell the Court that Mr. Smith was on the "medication that they have prescribed" and asked that a trial date be set. *Id.* Thus, Mr. Smith is correct that he never had a competency hearing, nor was Mr. Smith's fitness to proceed "determined by the court," as required by I.C. § 18-212(1).

Prior to the criminal trial, Mr. Smith told the court that Mr. Byington “wants me to get on medication and take – to take medication, because he feels maybe I’m aggressive or mad.” T (No. 35316) (October 15, 2007) pg. 88, ln. 23-25. Mr. Smith also told the court that he had been prescribed Celexa and Trazodone. *Id.*, pg. 91, ln. 24 - pg. 92, ln. 2. On October 29, 2007, two days before the start of trial, defense counsel told that court that he “was advised last week that the jail had taken [Mr. Smith] off one of his medications,” but “as of Friday, they would have – they were going to put him back on the medication.” He also told the court “we are prepared to go to trial, but he needs to be on his medication.” *Id.*, pg. 99, ln. 5 - pg. 100, ln. 10. During the trial, defense counsel said that it was his “understanding [was] that the jail has agreed to put him back on medications that was prescribed.” T (No. 35316) (October 31, 2007). However, no psychologist or psychiatrist was ever asked to reexamine Mr. Smith to determine what effect, if any, the medication was having. So, even if Mr. Smith was taking the indicated medication, there is no evidence in the record that the medications had restored his competence at the time of trial.

The district court did note during trial that it had not noticed anything inappropriate with Mr. Smith’s interactions with his attorney. *Id.*, pg. 349, ln. 3-17. However, the court noted that it had observed Mr. Smith “very vigorously” participating in his defense, “frequently talking with counsel . . . giving instructions to counsel [and] passing notes to counsel. And again, lots of communication.” *Id.*, pg. 349, ln. 3-17. Thus, none of the court’s observations foreclose the possibility that Mr. Smith was not competent as the basis of his lack of competency was his tendency to get “off target,” and act “fairly irrational, bizarre, and grandiose” as was noted by Dr. Smith. Competency Report, pg. 8 (in PSI). To the contrary, the type of intrusive communication



between client and attorney observed by the district court suggests Mr. Smith was manifesting the behavior which rendered him incompetent.

3. *The 2012 new trial motion*

In support of his January 19, 2012 motion for new trial, Mr. Smith provided a long statement of his history of serious and severe mental illness and incapacity. R No. #39704, pg. 2-17. Noting that Mr. Smith had filed at least five prior motions for a new trial, the court denied the January 19 motion on the basis that it was untimely and the court lacked jurisdiction to hear it. R No. #39704, pg. 23-24.

An appeal timely followed. R No. #39704, 26-29.

The Court of Appeals affirmed the district court on March 28, 2013, holding that the time to file a motion for a new trial based upon newly discovered evidence may not be filed beyond the two-year limitation. *State v. Smith*, 154 Idaho 581, 300 P.3d 1069 (Ct. App. 2013).

4. *The current new trial motion*

While the appeal in No. #39709 was pending, Mr. Smith filed another pro se motion for a new trial in the district court. CR 6. Mr. Smith again alleged that the district court had failed to *sua sponte* order a competency evaluation and “failed to ascertain whether or not the defendant was competent to proceed to trial.” *Id.* He also argued that “under § 18-210, Defendant[']s statutory time limit is tolled pending an evaluation to determine the Defendant’s competency to stand trial.” CR 6.

In his memorandum of law filed with the motion, Mr. Smith argued that “the district court’s allowance of the case to be proved while Defendant was still mentally ill violated statutes, laws and the Constitution of the state of Idaho.” CR 8. Further, “the statute [I.C. § 18-

210] requires that because the conviction was entered while Defendant was mentally incompetent that the time for final judgment be tolled pending a psychiatric examination.” CR 9. “Since the defendant cannot be convicted while incompetence endures, [h]e/she shall be entitled to statutory tolling pending medical evidence to show that the defendant is competent to proceed.” CR 16.

Mr. Smith also alerted the district court to United States Supreme Court case law which held that the one year statute of limitations for filing a federal petition for a writ of habeas corpus may be equitably tolled. CR 16, *citing Holland v. Florida*, — U.S. —, 130 S. Ct. 2549, 2560 (2010) (“[W]e hold that [28 U.S.C. ]§ 2244(d) is subject to equitable tolling in appropriate cases.”) In this argument, Mr. Smith says that *Holland* stands for the proposition that “a defendant is entitled to statutory tolling of the statute of limitations,” *id*, but it appears that he has confused statutory tolling of the time in which to file a pleading, *i.e.*, a tolling provision which is found in statutory law, with equitable tolling, *i.e.*, a tolling provision created by case law to provide relief under extraordinary circumstances.

Along with the Motion for New Trial and the memorandum in support, Mr. Smith filed a Motion to Request the Court Take Judicial Notice of the record in the case. He also filed a Motion for Appointment of Counsel. Aug. CR.<sup>2</sup> The court then issued an Order RE Motion for New Trial stating that “[i]t appears to this Court that the Court is without jurisdiction to hear any of these matters because a final judgment was entered more than two years ago,” and noting that I.C.R. 34 does not permit a new trial motion to be made for any reason more than two years after final judgment. It then ordered the parties to file a brief concerning the sole issue of whether the

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<sup>2</sup> On July 3, 2013, the Court granted Mr. Smith’s Motion to Augment the Record. The file-stamped documents attached to that motion are cited herein as “Aug. CR.”

court has jurisdiction to rule on Mr. Smith's motions. Aug. CR (Order, pg. 1-2).

The court's order for briefing on the statute of limitations issue was filed on March 27, 2013, one day before this Court issued its opinion in No. 39704. *State v. Smith*, 154 Idaho 581, 300 P.3d 1069 (Ct. App. March 28, 2013). In No. 39704, the Court found that Mr. Smith's new trial motion was untimely and rejected his argument that the language of I.C. § 19-2407—that a motion must be filed within the time provided by the rules “unless the court or judge extends the time”—permits a court to extend the two-year period. The Court wrote, “[t]he section 19-2407 contemplation of a possible extension of time by the court has no application in this case because the Idaho Criminal Rules do not permit a court to authorize such an extension.” *State v. Smith*, 154 Idaho at 582, 300 P.3d at 1070. Most pertinent to this appeal, the Court of Appeals wrote in a footnote: “Notably, Smith does not contend that his motion for a new trial was based upon evidence that was not discovered until after the two-year period had expired, or that he was prevented from timely filing his motion by action of the State, or that the time limit of I.C.R. 34 is unconstitutional in its application to his case.” *Id.*, n. 3.<sup>3</sup>

In the present case, perhaps taking the hint from the Court of Appeals's footnote, Mr. Smith argued, in response to the Court's order for briefing, that “I.C.R. 34 is unconstitutional and that the Idaho Statute 19-2406 does not provide a procedural mechanism for this particular case were [sic - where] the statute violates both I.C. and Idaho Constitution.” Aug. CR (Response to Court's Order, pg. 1). In particular, he argued that “the application of I.C.R. 34 is

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<sup>3</sup> It is no surprise that these arguments were not made on appeal because they were not made below, see CR No. 39704, and the fundamental error doctrine does not apply to post-conviction proceedings. *Person v. State*, 147 Idaho 453, 455, 210 P.3d 561, 563 (Ct. App. 2009). So the point of the Court's footnote is unclear, unless it was to suggest that Mr. Smith take a new tack.

unconstitutional in its application in this case.” Aug. CR (Memorandum of Law in Support of Response to Court Order, pg. 4). “The I.C.R. 34 has no procedural mechanism to address a clearly invalid conviction, which would address the nature of malfeasance of the court. It’s [c]lear that the statute in this case is unconstitutional on the grounds of due process and the equal protections of the law.” Aug. CR (Memo., pg. 10). (This was filed on April 9, 2013, less than two weeks after the issuance of the opinion in No. 39704.)

The state’s response to the court’s briefing order was to merely note the Court of Appeals’s opinion in No. 39704 and argue that “the decision from the Court of Appeals affirming this Court’s prior denial of this defendant’s motion for a new trial in this very case is on point, and the motion is untimely and should be denied.” Aug. CR (State’s Response, pg. 2). The state did not address Mr. Smith’s new constitutional issues.

The court did not discuss Mr. Smith’s constitutional arguments either. Instead, it only stated that it “knows of no rule, statute, or case law that would give the Court jurisdiction to hear any of these matters and the parties have cited to none.” CR 50. It continued: “Defendant’s motion for new trial is frivolous and he is not entitled to the appointment of counsel.” With that, the court denied all of Mr. Smith’s motions. *Id.*

A timely notice of appeal was filed. CR 52.

### **III. ISSUE PRESENTED FOR REVIEW**

Did the court err in denying Mr. Smith’s motion for appointment of counsel in light of the non-frivolous constitutional tolling argument made by him?

#### IV. ARGUMENT

A. The District Court Erred in Denying Mr. Smith's Motion for Appointment of Counsel

A needy person has the right to be represented by counsel in any post-commitment proceeding that the needy person considers appropriate, “unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.” I.C. § 19-852(b)(3); *see also State v. Wade*, 125 Idaho 522, 523–24, 873 P.2d 167, 168–69 (Ct. App. 1994). According to the Supreme Court:

When applying that standard to pro se applications for appointment of counsel, the trial court should keep in mind that petitions and affidavits filed by a pro se petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the pro se petitioner simply does not know what are the essential elements of a claim.

*Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). The decision to appoint counsel in a post-judgment proceeding lies within the discretion of the district court. Thus, on appeal, the decision whether to appoint counsel is reviewed under the abuse of discretion standard. *See Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Here, the district court found the proceeding was untimely and therefore frivolous. It abused its discretion in so concluding because it did not even consider Mr. Smith's constitutional argument which this Court in No. 39704 specifically noted was not before it. *State v. Smith*, 154 Idaho at 582, n.3, 300 P.3d at 1070, n. 3. Had the district court considered the new constitutional issue, it would have appointed Mr. Smith counsel to present that argument and to support the argument with affidavits and supporting documents.

Mr. Smith argued that the application of the I.C.R. 34 time limit violated his due process and equal protection rights. He is correct. Access to courts has been called a “fundamental right.” *Evensiosky v. State*, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001); *see Bounds v. Smith*, 430 U.S. 817, 827 (1977); *and also Coleman v. State*, 114 Idaho 901, 762 P.2d 814 (1988). While Article 1, Section 18 of the Idaho Constitution states that “Courts of justice shall be open to every person,” the right of access to the courts has been grounded in the Due Process Clauses of the Idaho and United States Constitutions. *Id.*; *see Martinez v. State*, 130 Idaho 530, 535, 944 P.2d 127, 132 (1997); *see also Murray v. Giarratano*, 492 U.S. 1, 11 n. 6 (1989). Due process affords prisoners “a limited right of access to the courts, to challenge their convictions or their confinement and to pursue actions for violations of their civil rights.” *State, Bureau of Child Support Services v. Garcia*, 132 Idaho 505, 510, 975 P.2d 793, 798 (Ct. App. 1999) *citing Bounds*, 430 U.S. at 821.

Inmate access to the courts must be “adequate, effective, and meaningful.” *Bounds, supra*. To this end, indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees, *Burns v. Ohio*, 360 U.S. 252, 257, (1959); states must provide trial records to inmates unable to buy them, *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); and counsel must be appointed to give indigent inmates “a meaningful appeal” from their convictions. *Douglas v. California*, 372 U.S. 353, 358 (1963). The right of access ensures that a pleading challenging the legitimacy of state custody will reach a court for its consideration. *Evensiosky v. State*, 136 Idaho at 191.

Mental disease and/or psychotropic medication which prevented the petitioner from timely pursuing challenges to the conviction have been recognized as bases for equitable tolling in Idaho

in the post-conviction context. *Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996). This is consistent with the general rule in the United States. See Brian R. Means, “Equitable tolling—Extraordinary circumstances—Mental and physical disabilities of the petitioner,” Postconviction Remedies § 25:45 (Database updated July 2013). In *Abbott*, “the applicant alleged that he was mentally incompetent during the criminal proceedings and that following his sentencing he was kept under the influence of psychotropic medication which kept him mentally incapacitated. His response to the State’s motion to dismiss alleges that he was only recently taken off of these drugs.” The Court noted that “[t]hese allegations were not disproved by the State.” It concluded that:

Abbott’s assertion that mental disease or psychotropic medication rendered him incompetent and prevented him from earlier pursuing challenges to his conviction are sufficient to raise factual issues and intertwining legal issues as to whether he was prevented from timely filing his action by mental incapacity or medication, whether strict application of the one-year statute of limitation would deprive Abbott of any meaningful opportunity to present his claims for post-conviction relief, and whether the statute of limitation should be deemed tolled in such circumstance to avoid violation of constitutional due process guarantees. . . . Because these factual and legal issues were not recognized or addressed in the proceedings below, we decline to affirm the determination that Abbott’s claim is barred by the statute of limitation.

*Abbott v. State*, 129 Idaho at 385, 924 P.2d at 1229 (internal citations omitted).

The Court in *Chico-Rodriguez v. State*, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005), clarified *Abbott*:

It is not enough to show that compliance was simply made more difficult on account of a mental condition. We hold that in order for the statute of limitation under the UPCA to be tolled on account of a mental illness, an unrepresented petitioner must show that he suffered from a serious mental illness which rendered him incompetent to understand his legal right to bring an action within a year or otherwise rendered him incapable of taking necessary steps to pursue that right.

Equitable tolling will apply only during the period in which the petitioner's mental illness actually prevented him from filing a post-conviction action; any period following conviction during which the petitioner fails to meet the equitable tolling criteria will count toward the limitation period.

*Id.*

Thus, if Mr. Smith could demonstrate that his mental illness prevented him from timely filing his claim, he could show the strict application of the Rule 34 time limits were violative of due process. This is not a frivolous claim. However, it was not considered when the court denied the motion for appointment of counsel. This was an abuse of discretion under the *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991), test because (1) the trial court did not correctly perceive the issue as one of discretion, instead it felt compelled to deny the motion by its conclusion that it had no jurisdiction; (2) the trial court failed to act consistently with the legal standards applicable to the specific choices available to it because the constitutional argument was not frivolous; and (3) the trial court did not reach its decision by an exercise of reason because it never considered the tolling argument.

The denial of the motion for appointment of counsel cannot be justified by the fact that the court believed it did not have jurisdiction to consider the motion for a new trial. Mr. Smith's argument was that his motion was timely because the time to file must be tolled in order to comply with constitutional requirements. And as the Court of Appeals has said, "It is fair to say, of course, that a court has jurisdiction to determine whether it possesses jurisdiction." *State v. Peterson*, 148 Idaho 610, 614, 226 P.3d 552, 556 (Ct. App. 2010) *citing United States v. Ruiz*, 536 U.S. 622, 628 (2002); and *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1064 (9<sup>th</sup> Cir. 2003). Without the assistance of counsel, however, Mr. Smith was not able to develop the record needed to establish his constitutional claim about why the district court had jurisdiction to rule on the new trial motion.

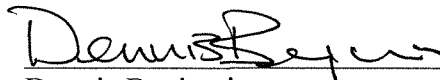


Accordingly, the Court should vacate the order denying the Motion for New Trial and reverse the order denying the Motion for Appointment of Counsel and remand for further proceedings. *See Anderson v. State*, 133 Idaho 788, 790, 992 P.2d 783, 785 (Ct. App. 1999) (“Because Anderson was not allowed to present evidence in support of his claim that the limitation period should be tolled, we reverse.”).

## V. CONCLUSION

For the reasons set forth above, the court abused its discretion in denying Mr. Smith’s Motion for Appointment of Counsel and that order should be reversed. Mr. Smith also asks this Court to vacate the order denying the new trial motion and remand with instructions for further proceedings to allow Mr. Smith to develop the facts needed to fully present his constitutional challenge to the I.C.R. 34 time limit as applied in this case.

Respectfully submitted this 2<sup>nd</sup> of August, 2013.

  
Dennis Benjamin  
Attorney for Dana Smith

CERTIFICATE OF SERVICE

I CERTIFY that on August 23, 2013, I caused two true and correct copies of the foregoing document to be:

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Dennis Benjamin